

ECR Consulting IR35 ruling reveals the many factors that kept contractor outside IR35

Contractor Elaine Richardson was found to be outside **IR35**, according to all the key tests of employment, including **control**, **substitution** and **mutuality of obligation**. This was the conclusion of First-Tier Tribunal Judge David Porter in his **ruling on the ECR Consulting case**.

"We have considered the facts and the law and have decided that Miss Richardson was employed under a **contract for services**," concluded Judge Porter, who also confirmed that: "ECR is a genuine business and therefore not a target of the **IR35 legislation**."

This ruling is notable because Richardson's exoneration was almost complete on every factor of **determining IR35 status** – she not only failed to meet the three classic conditions of a contract of service to exist (which would have put her inside IR35), but also demonstrated that she was genuinely **in business on her own account**.

And there are lessons from this case that can be applied by the **IR35 Forum** as it offers ideas to **HMRC** on how to better administer IR35.

Control – Richardson was not told how to perform her duties

Richardson's client project manager, Linda Brown of Vertex Data Systems (VDS), claimed that Richardson was under overall control, despite there being no company procedures or standards about how to conduct the work Richardson was hired to complete.

The tribunal accepted that Richardson received advice on how the client's organisation worked but did not accept that, even though Brown has relevant qualifications, Richardson was told by her how to perform.

Porter noted: "We do not accept, even with the qualifications [Brown] advised us of, that she was able to tell Miss Richardson how to do the work or the time she should expend in doing so."

'Peer review' for quality control is not control

HMRC proposed that, because Richardson's work was subject to a peer review system for quality control, she was controlled. This point was rejected on the grounds that such testing was for the purpose of "the whole team to examine how the project was progressing with a view to resolving problems".

There is evidence that the rate of pay had a bearing on Richardson's control status. The tribunal believed "The level of payment indicates that Miss Richardson is clearly a knowledgeable computer expert capable of handling complex work."

This highlights that highly paid knowledge workers are unlikely to be controlled, and that HMRC clearly do not understand workplace processes, such as best practice in software development.

Do day rates put contractors outside of IR35?

Furthermore, although the contractor had a set 37.5 hour week in her contract, and submitted timesheets accordingly, Richardson maintained her own company records that demonstrated she worked longer or shorter hours each week. These varied from 31 hours to 45 hours, effectively providing that "she could work the hours she pleased."

Had the contractor been working on an hourly rate basis, it is possible that the tribunal would not have come to this conclusion, so other contractors exhibiting similar behaviours when on day rates may have an advantage over hourly-paid contractors if called upon to prove their 'outside IR35 status'.

Richardson's day rates varied substantially across contracts with the client, ranging from £600 to £350 a day. This variation in rates would not normally be seen in an employment relationship, so was cited as additional evidence that the arrangement was not an employment contract.

No 'personal service' and the right of substitution was allowed

Both the contract between Richardson's contractor limited company, ECR Consulting, and the agency (the lower level contract), and the agency and client contract (the upper level contract), made provision for substitution. HMRC contested that the right of substitution was fettered because the client's permission was required before a substitute could be appointed.

But Richardson was hired without an interview, and the client had asked the agency to supply the contractor with the best available qualifications, and not Richardson specifically. The agency hired Richardson's personal services, but the client did not.

Therefore despite HMRC's and the client's claim that the substitution clause was fettered, the tribunal found: "We do not accept that in reality the substitution clause was in any way fettered as suggested [by HMRC]. On that basis we are satisfied that the hypothetical contract would have to have a

valid substitution clause, which could only be found in a contract for services.”

Lack of mutuality proved by contract and behavioural evidence

Although the contracts between clients VDS and the agency were unsigned, the tribunal accepted them as having been executed. Contractors should therefore take note that even unsigned contracts, if acted upon, may be allowable as evidence in an IR35 case.

The contract between the agency and ECR Consulting clearly stated that there would be no obligation to supply further work for Richardson. A similar clause existed in the contract between the agency and the client VDS.

Richardson had turned down work offered by VDS, and had had a previous contract terminated early. Not surprisingly, therefore, the ruling confirmed there was no mutuality, stating that this was “not a provision that would be found in a contract of services”.

“It is clear to us that ECR is a genuine business”

There was substantial evidence that Richardson was genuinely in business on her own account via her contractor limited company, ECR Consulting. She had business cards and stationery, advertised her services and published a website. Other business infrastructure included professional indemnity insurance, trade membership with PCG and a dedicated home office.

In addition, the company had retained reserves, had invested in development projects and had taken on fixed-price work for multiple clients simultaneously. Richardson stated that one of the reasons she originally incorporated was to guard against the risks of personal liability if sued by a client. All these factors led the tribunal to conclude that ECR Consulting is a genuine business.

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Implications for determining business tests

An underlying factor, which could impact on the efforts by the IR35 Forum to create business tests to assist with IR35 status determination, is that Richardson was hired to perform an IT development task that was exactly the same as tasks being undertaken by existing employees of her client.

The fact that a worker can be performing what appear to be identical tasks to an employee and yet be found to be outside IR35 makes the IR35 Forum’s self-appointed task of devising a set of objective business tests to determine employment, and therefore IR35 status, virtually impossible.

The ECR Consulting ruling demonstrates how important the work of the IR35 Forum could be in supporting HMRC to better administer IR35. Cases such as this, where the contractor is so clearly not a disguised employee and may only have been targeted because of the potential yield in back taxes, interest and fines, should never get as far as a tribunal.

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